

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

National Consumer Credit Protection Act 2009

Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers) (Mortgage Brokers) Regulations 2020

Section 329 of the *National Consumer Credit Protection Act 2009* (the Credit Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Credit Act to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Credit Act.

The *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers) (Mortgage Brokers) Regulations 2020* (the Regulations), together with Schedule 3 to the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Act 2020* (the Act) implement the Government's response to Recommendation 1.3 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Financial Services Royal Commission), to address conflicted remuneration for mortgage brokers.

The Regulations amend the *National Consumer Credit Protection Regulations 2010* (the Credit Regulations) to prescribe circumstances under which a benefit is and is not conflicted remuneration. They also prescribe circumstances under which conflicted remuneration must not be accepted and circumstances in which conflicted remuneration must not be given.

The Regulations amend the Credit Regulations to prescribe five different kinds of benefits that are not conflicted remuneration. These are:

- certain monetary and non-monetary benefits given by the consumer;
- monetary benefits that meet a number of specific requirements directed at ensuring the benefits are transparent and do not negatively impact consumers;
- infrequent, low-value non-monetary benefits;
- non-monetary benefits related to education and training; and
- non-monetary benefits related to IT support.

In relation to the second kind of benefit, the requirements include that the benefits are not volume-based benefits or campaign-based benefits. In relation to certain residential property loans, if a benefit is linked to the amount borrowed, the value of any commissions paid within the first year of the loan must be linked to the amount drawn down by the borrower, calculated in accordance with the Regulations.

Clawback arrangements in relation to monetary benefits must also meet certain requirements.

The Regulations also amend the Credit Regulations to prescribe circumstances in which conflicted remuneration must not be accepted and must not be given. The amendments enliven the obligations introduced by the Act not to accept and not to give conflicted remuneration.

The Regulations also make amendments to the Credit Regulations that are consequential to changes made by the Act.

On 26 August 2019, the Government released a version of the Regulations for public consultation until 4 October 2019. The Government received 47 submissions including feedback from consumer groups, industry and the Australian Securities and Investments Commission. Treasury then revised the Regulations and undertook further targeted consultation.

As a result of consultation, several changes were made, including modifying how the maximum commission payable to the broker on the amount drawn down by the borrower is calculated, as well as excluding line of credit facilities, reverse mortgages and credit facilities which are predominantly for construction or renovation purposes from this calculation. Changes were also made to clarify that benefits legitimately attributable to economies of scale are not volume-based benefits.

Details of the Regulations are set out in Attachment A.

The Credit Act does not specify any conditions that need to be met before the power to make regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after they are registered. However, the effect of the *ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487*, registered on 27 May 2020, is that persons will only be required to comply with these obligations from 1 January 2021.

The Office of Best Practice Regulation has agreed to the estimates of annual average compliance costs relating to the Recommendation 1.3 of the Financial Services Royal Commission as \$18.9 million a year for business.

The Financial Services Royal Commission Final Report has been certified as being informed by a process and analysis equivalent to a Regulation Impact Statement for the purposes of the Government decision to implement this reform.¹

A Statement of Compatibility with Human Rights is at Attachment B.

¹ The full regulation impact statement can be accessed online through the Australian Parliament House website:

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=date-eFirst;page=1;query=%22Royal%20Commission%22%20Date%3A01%2F02%2F2019%20%3E%3E%2028%2F02%2F2019%20Dataset%3Atabledpapers;rec=9;resCount=Default>

Details of the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers) (Mortgage Brokers) Regulations 2020*

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers) (Mortgage Brokers) Regulations 2020* (the Regulations).

Section 2 – Commencement

This section provides that the Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

The Regulations are made under the Credit Act.

Section 4 – Schedules

This section provides that each instrument that is specified in the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1 – Main Amendments

Items 1 and 3 – subregulation 3(1) (definition of *associate*) and before subregulation (4)(1)

These items make consequential amendments to the definition of associate in the Credit Regulations to reflect the insertion of a new definition of associate by the Act.

Item 2 – subregulation 3(1)

This item inserts new definitions of ‘campaign-based benefit’, ‘clawback requirements’, ‘drawdown cap’, ‘excluded amount’, ‘home renovation or improvement facility’, ‘line of credit facility’, ‘maximum drawdown net of offset’, ‘offset account’, ‘volume-based benefit’, and ‘year to which the drawdown cap applies’ into the Regulations.

Item 4 – in the appropriate position in Chapter 3

This item inserts a new Part 3.9 into the Credit Regulations which applies in relation to mortgage brokers and mortgage intermediaries and their representatives.

The Regulations provide for when something is conflicted remuneration, and when it is not, for the purposes of paragraph 158NA(b) of the Credit Act.

Division 1 - Interpretation

The Regulations apply in relation to the provision of a credit service. Credit service is defined in section 7 of the Credit Act. A person provides a credit service if a person provides credit assistance to a consumer (see section 8 of the Credit Act), or if the person acts as an intermediary (see section 9 of the Credit Act).

To avoid doubt, the Regulations provide that a reference in the new Part to a licensee, or a representative of a licensee and providing a credit service to a consumer includes both the licensee or representative providing credit assistance to the consumer, and the licensee or representative acting as an intermediary between a credit provider and the consumer. (Schedule 1, item 4, regulation 28V)

The Regulations also provide that the term ‘amount of credit’ has the same meaning as in the National Credit Code in Schedule 1 to the Credit Act. (Schedule 1, item 4, regulation 28VA)

Division 2 – What is conflicted remuneration?

The definition of conflicted remuneration in section 158N of the Credit Act provides that conflicted remuneration means any benefit, whether monetary or non-monetary that is:

- given to a licensee, or a representative of a licensee, who provides credit assistance to consumers that, because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence the credit assistance provided. This will include the choice of credit contract or credit provider or the choice of whether to provide credit assistance or not); or
- given to a licensee, or a representative of a licensee, who acts as an intermediary and because of the nature of the benefit of the circumstances in which it is given, could be reasonably expected to influence whether or how the licensee or representative acts as an intermediary.

Benefits given that fall outside this definition will not be subject to the ban on conflicted remuneration under the new law.

In addition, the Regulations provide that monetary benefits and non-monetary benefits given in certain circumstances are not conflicted remuneration for the purposes of paragraph 158NA(b) of the Credit Act. (Schedule 1, item 4, regulations 28VB and 28VH)

Benefits given by a consumer

The Regulations ensure that fees paid to a mortgage broker by a consumer are not captured within the definition of conflicted remuneration. They exclude from the definition of conflicted remuneration the giving of monetary benefits by consumers to a licensee or a representative of a licensee if they are given in relation to a credit service provided to the consumer by the licensee or representative.

Likewise, non-monetary benefits given by a consumer in such circumstances are excluded from the definition of conflicted remuneration. (Schedule 1, item 4, subregulations 28VB(2) and 28VH(7))

Other mortgage broker and mortgage intermediary remuneration

A monetary benefit given (whether directly or indirectly) to a licensee, or a representative of a licensee, is not conflicted remuneration if the benefit meets certain criteria. Those criteria are that:

- the benefit relates to a credit service provided by the licensee or representative to a consumer who is a debtor under a credit contract; (Schedule 1, item 4, paragraph 28VB(3)(a))
- the benefit is not a volume-based benefit; (Schedule 1, item 4, paragraph 28VB(3)(b))
- the benefit is not a campaign-based benefit; (Schedule 1, item 4, paragraph 28VB(3)(c))
- for residential property loans to which the drawdown cap applies, the benefit meets the drawdown requirements or is unconnected to the size of the loan or amount of the loan drawn down (for example, a fixed fee); (Schedule 1, item 4, paragraph 28VB(3)(d)) and
- the clawback requirements, if applicable, are satisfied in relation to the benefit. (Schedule 1, item 4, paragraph 28VB(3)(e))

Special rules for certain residential property loans – the drawdown cap

There are additional requirements that apply for the purposes of certain residential property loans. Benefits paid in relation to these loans are only exempt from the definition of conflicted remuneration if these additional requirements are met.

Specifically, if the benefit is linked to the amount borrowed, the benefit must be linked to the amount drawn down by the borrower (or must otherwise be provided without reference to the amount of credit provided or drawn down).

Benefits to which the drawdown cap applies

The drawdown cap applies in relation to a monetary benefit given (whether directly or indirectly) to a licensee or a representative of a licensee if the benefit relates to a credit contract secured by a mortgage over a residential property.

Such benefits must be either one of the following benefits, or a combination of the following benefits:

- a benefit provided without reference to a particular amount of credit provided to, or drawn down by, the consumer under the credit contract; or
- a benefit that is calculated as a percentage of an amount and cannot be more than the maximum drawdown of the credit contract for the year to which the drawdown cap applies in relation to the credit contract (net of offsets). The method for calculating this is set out in regulation 28VD in item 4 of Schedule 1 to the Regulations.

The drawdown cap only applies to benefits given within one year of the beginning of the credit contract (regardless of whether they are upfront or trail commissions). The drawdown cap does not apply to benefits given after this period.

This period generally starts from the first day on which an amount of credit is drawn down by the consumer under the credit contract. However, for a credit contract under which credit is provided that is wholly or partly to refinance credit, the one year period starts on the first day on which an amount of credit is drawn down by the consumer under the credit contract after the refinanced credit is made available. (Schedule 1, item 4, paragraph 28VC(1)(e) and subregulation 28VC(2))

A benefit is given on the day it is provided to the relevant licensee or representative.

Additional credit arranged by variation to the credit contract, such as a 'top-up', would also be subject to the drawdown cap if it constitutes a benefit to which the drawdown cap applies.

The drawdown cap does **not** apply if:

- the benefit relates to a reverse mortgage (Schedule 1, item 4, paragraph 28VC(1)(b));
- the benefit relates to a line of credit facility (Schedule 1, item 4, paragraph 28VC(1)(c));
- the benefit relates to the provision of credit under a home renovation or improvement facility; (Schedule 1, item 4, subparagraph 28VC(1)(d)(i)); or
- the benefit relates to the provision of credit wholly or partly to refinance credit where the original or additional credit is provided under a home renovation or improvement facility. (Schedule 1, item 4, subparagraph 28VC(1)(d)(ii))

Reverse mortgage is defined in section 5 of the Credit Act and section 13A of the National Credit Code in Schedule 1 to the Credit Act.

A line of credit facility is defined as a continuing credit contract under which the debtor is not obliged to repay any amounts of credit drawn down under the contract, or to otherwise reduce their liability under the contract, until:

- the debtor's total liability under the contract reaches or exceeds the limit specified in the contract; or
- if credit is available to the debtor under the contract only for a specified period – when the period has ended. (Schedule 1, item 4, subregulation 28VC(3))

A home renovation or improvement facility is a facility made available under a credit contract, the whole or predominant purpose of which is to provide credit to renovate or improve residential property. (Schedule 1, item 4, subregulation 28VC(4))

The reference to a whole or predominant purpose of renovating or improving residential property is drawn from section 5 of the National Credit Code in Schedule 1 to the Credit Act. A loan predominantly for the purpose of renovating or improving residential property includes a construction loan.

Benefits to which the drawdown cap does not apply are payable provided they fall outside the definition of conflicted remuneration in the Credit Act or fall within the criteria in the Regulations as a benefit that is not conflicted remuneration. For example, although a benefit that relates to a line of credit facility is not subject to the drawdown cap, it would not be payable if it was a volume-based benefit or a campaign-based benefit.

Working out the drawdown cap – the maximum drawdown net of offset for a credit contract

The maximum drawdown net of offset for a credit contract under which a consumer is a debtor is calculated by working out, for each day during the year to which the drawdown cap applies, the difference between:

- the amount of credit provided to the consumer under the credit contract, as the amount stands on that day, including any interest, fees and charges. However, it excludes credit (or interest, fees and charges) relating to a reverse mortgage, a line of credit facility or a home renovation or improvement facility; and
- the total of all amounts standing to the credit of the consumer in all offset accounts held by the consumer on that day in relation to the credit contract. (Schedule 1, item 4, subregulations 28VD(1) and (3))

The maximum drawdown net of offset for the credit contract, for the year to which the drawdown cap applies in relation to the credit contract, is the greatest amount worked out for any day during the year. (Schedule 1, item 4, subregulation 28VD(2))

The Regulations define an offset account in subregulation 28VD(4) in item 4 of Schedule 1 to the Regulations. An offset account held by a consumer who is a debtor under a credit contract means a facility held by a consumer in relation to which either of the following apply:

- the amount standing to the credit of the facility at a particular time is notionally offset against the amount of credit provided to the consumer under the credit contract that has not been repaid at that time and interest is calculated by reference to the resulting notionally reduced amount of credit; or
- the interest payable under the credit contract is periodically reduced by an amount that would otherwise accrue as interest or other earnings on the amount standing to the credit of the facility from time to time.

Mistaken but reasonable calculation of the drawdown cap

In circumstances of a mistaken but reasonable overestimation of what the maximum drawdown net of offset for the credit contract would be for the relevant year, the benefit is taken to meet the requirements of the drawdown cap. However, the excess benefit must be refunded within three months after the end of the year to which the drawdown cap applies.

Specifically, this exemption applies if the benefit is calculated as a percentage of an amount that is greater than the maximum drawdown (net of offset) for the credit contract for the year to which the drawdown cap applies in relation to the credit contract. However, the use of that greater amount must only arise because of a mistaken, but reasonable estimation, of what the maximum drawdown net of offset for the credit contract would be for the year to which the drawdown cap applies in relation to the credit contract. (Schedule 1, item 4, paragraphs 28VB(4)(a)-(d))

The exemption only applies if an amount is refunded by the licensee or representative to the person who paid the benefit within three months after the end of the year to which the drawdown cap applies in relation to the credit contract. The amount to be refunded is the benefit paid to the licensee or representative less the benefit that would have been paid to the licensee or representative if the correct maximum drawdown (net of offset) for the credit contract for the relevant year had been used. (Schedule 1, item 4, paragraph 28VB(4)(e))

Volume-based benefits

Under the Regulations, volume-based benefits are banned. The exemption from the ban on conflicted remuneration in regulation 28VB explicitly excludes volume-based conflicted remuneration. (Schedule 1, item 4, paragraph 28VB(3)(b))

A ‘volume-based benefit’ is a payment or non-monetary benefit that is dependent on the overall volume of sales of a particular class of credit contract that are made. It includes commissions that are dependent on the number of contracts or credit contracts of a particular class entered into by consumers or a class of consumers. It also includes commissions that are dependent on the total amount of credit available or drawn down under credit contracts or credit contracts of a particular class. (Schedule 1, item 4, subregulation 28VE(1))

The Regulations include an exception for benefits legitimately attributable to economies of scale. A banned ‘volume-based benefit’ does not include benefits given to licensees or their representatives to the extent that they are discounts or rebates attributable to economies of scale because of the number or value of contracts in relation to which the licensee or representative provides credit services to consumers. (Schedule 1, item 4, subregulation 28VE(2))

Campaign-based benefits

Under the Regulations, campaign-based benefits are banned. The exemption from the ban on conflicted remuneration in regulation 28VB explicitly excludes campaign-based benefits. (Schedule 1, item 4, paragraph 28VB(3)(c))

Campaign-based commissions provide higher rates of commissions offered on a time-limited basis. Lenders may use these offers to increase the flow of broker-originated loans on a targeted, short-term basis.

A campaign-based benefit is defined as a benefit that is wholly or partly dependent on the credit service being provided during a particular limited period or the consumer entering the credit contract during a particular limited period. (Schedule 1, item 4, paragraphs 28VF(a) and (b))

Such a benefit is a campaign-based benefit if:

- the same benefit would not ordinarily be accessible in relation to the same provision of the credit service by the licensee or representative before or after the campaign period; (Schedule 1, item 4, subparagraph 28VF(c)(i)); or
- the value of the benefit is more than the benefit that would ordinarily be given in relation to the same provision of the credit service by the licensee or representative before or after the campaign period. (Schedule 1, item 4, paragraph 28VF(c)(ii))

Clawback requirements

Under the Regulations, certain clawback arrangements are banned. The exemption from the definition of conflicted remuneration in regulation 28VB does not extend to a benefit unless specified ‘clawback requirements’ are satisfied in relation to the benefit. (Schedule 1, item 4, paragraph 28VB(3)(e))

Currently, many credit providers have clawback arrangements with aggregators, which in turn have arrangements with brokers. Such arrangements allow a credit provider to recover some or all of the commission paid by the lender to the aggregator if the loan does not continue beyond a minimum ‘clawback period’. The aggregator will then in turn claw back the commission from the broker, who may claw it back from the consumer.

Clawbacks may therefore discourage mortgage brokers and consumers from exploring new and better loans because they add to the cost of switching products.

Regulation 28VG sets out the specific ‘clawback requirements’ that must be met if a benefit is to fall within the exemption in regulation 28VB from the definition of conflicted remuneration.

Firstly, the Regulations ban clawback arrangements if they apply for more than two years from the beginning of the credit contract. The two years is generally timed from the first day on which an amount of credit is drawn down by the consumer under the credit contract. However, for a credit contract under which credit is provided that is not wholly or partly to refinance credit, the two years starts on the first day on which an amount of credit is drawn down by the consumer under the credit contract after the refinanced credit is made available. (Schedule 1, item 4, paragraph 28VG(2)(a))

Secondly, the Regulations ban clawback arrangements if the repayment obligation required repayment of an amount greater than the benefit given to the licensee or representative. (Schedule 1, item 4, paragraph 28VG(2)(b))

Finally, the Regulations have the effect that a consumer must not be subject to an obligation to pay an amount as a result of an amount being required to be repaid. Otherwise, the exemption from the definition of conflicted remuneration in regulation 28VB will not extend to the benefit. (Schedule 1, item 4, paragraph 28VG(2)(c))

Non-monetary benefits given in certain circumstances not conflicted remuneration – Regulation 28VH

The Regulations provide that, for the purposes of paragraph 158NA(b) of the Credit Act, non-monetary benefits given in certain circumstances are not conflicted remuneration. (Schedule 1, item 4, regulation 28VH)

To the extent that they could not reasonably be expected to influence the credit assistance provided to consumers, tiered servicing or preferential service arrangements provided to licensees or their representatives will not constitute conflicted remuneration.²

Infrequent benefit valued less than \$300

The Regulations provide that a non-monetary benefit is not conflicted remuneration if the value of the benefit is less than \$300 for each licensee or each representative who is a financial services licensee and identical or similar benefits are not given on a frequent or regular basis. (Schedule 1, item 4, subregulation 28VH(2))

Education or training

The Regulations provide that certain education or training benefits given to a licensee, or representative of a licensee, who provides a credit service to consumers are not conflicted remuneration.

The benefit must have a genuine education or training purpose, and must be relevant to the carrying on of a business of providing a credit service to consumers. (Schedule 1, item 4, paragraph 28VH(3)(a) and (b))

If the benefit is not the provision of an education or training course, the dominant purpose of the benefit must be education and training. (Schedule 1, item 4, paragraph 28VH(3)(d))

If the benefit is the provision of an education or training course (including a conference or seminar), the education or training activities for the professional development of the participants in the course must take up at least 75 per cent of the time spent on the course or 6 hours per day, whichever is the lesser (Schedule 1, item 4, paragraph 28VH(4)(a))

It is also a requirement that the costs of the participant's travel and accommodation relating to the course and the events and functions held in conjunction with the course (for example, the cost of day trips or dinners) are paid for by the participant, the participant's employer or licensee.

They may also be paid by a mortgage intermediary that provides services to the participant or the participant's employer or licensee to assist in carrying on a business of providing credit assistance to consumers. This does not prevent a mortgage intermediary or aggregator from paying for the costs of such benefits if they are the

² See the definition of conflicted remuneration in section 158N of the Credit Act.

participant's employer or licensee. (Schedule 1, item 4, paragraph 28VH(4)(b) and subregulation 28VH(5))

Where a credit provider wishes to provide a monetary benefit to a mortgage intermediary, which the intermediary may use to provide education or training benefits for a licensee or representative of a licensee who provides credit assistance to consumers, this will be permissible to the extent that the monetary benefit provided to the intermediary could not reasonably be expected to influence the credit assistance provided to consumers, as per the definition of conflicted remuneration in the Credit Act.³

IT support

The Regulations also provide that IT support given to a licensee, or representative of a licensee, who provides credit services to a consumer is not conflicted remuneration. This exemption applies to the provision of IT software or support that is related to the provision of credit services to consumers in relation to credit contracts with the benefit provider. (Schedule 1, item 4, subregulation 28VH(6))

Non-monetary benefits given by consumer

The Regulations provide that the giving of non-monetary benefits by consumers to a licensee or a representative of a licensee is not conflicted remuneration if it is given in relation to a credit service provided to the consumer by the licensee or representative. (Schedule 1, item 4, subregulation 28VH(7))

Division 3 – Circumstances in which conflicted remuneration must not be accepted

Division 3 of new Part 3.9 of the Credit Regulations sets out circumstances in which a licensee must not accept conflicted remuneration.

Section 158NB of the Credit Act provides that a licensee must not accept conflicted remuneration in circumstances prescribed by the Regulations if the licensee is a mortgage broker or the licensee is a mortgage intermediary.

Regulation 28VI provides that a licensee must not accept conflicted remuneration if the conflicted remuneration relates to credit assistance provided by the licensee to a consumer in relation to a credit contract. It also provides that the licensee must not accept conflicted remuneration if the conflicted remuneration relates to whether or how the licensee acts as an intermediary between a credit provider and consumer in relation to a credit contract.

However, subregulation 28VI(2) does not apply in relation to a credit service provided to a consumer in relation to a credit contract by a credit representative acting within the scope of the credit representative's actual or apparent authority from the licensee. Credit representatives are dealt with in regulation 28VI.

³ See section 158N of the Credit Act.

Subsection 158NC(1) of the Credit Act provides that a credit representative must not accept conflicted remuneration in circumstances prescribed by the Regulations if the licensee is a mortgage broker or the licensee is a mortgage intermediary.

Regulation 28VJ provides that a credit representative of a licensee must not accept conflicted remuneration if the conflicted remuneration relates to credit assistance provided by the licensee to a consumer in relation to a credit contract by the credit representative acting within the scope of the credit representative's actual or apparent authority from the licensee. It also provides that the credit representative must not accept conflicted remuneration if the conflicted remuneration relates to whether or how the licensee acts as an intermediary between a credit provider and consumer in relation to a credit contract while acting within the scope of the credit representative's actual or apparent authority from the licensee.

Division 4 – Circumstances in which conflicted remuneration must not be given

Division 4 of new Part 3.9 of the Credit Regulations prescribes circumstances in which conflicted remuneration must not be given.

Subsections 158ND(1) and (2) of the Credit Act provide that an employer of a licensee or representative of a licensee must not give the licensee or representative conflicted remuneration in circumstances prescribed by the Regulations, if the licensee or the representative is a mortgage broker or mortgage intermediary.

Subregulation 28VK(2) provides that an employer of a licensee must not give conflicted remuneration to the licensee or a representative of the licensee (other than a credit representative), if it would be a contravention of section 158NB of the Credit Act for the licensee or representative to accept the conflicted remuneration.

Subregulation 28VK(3) provides that an employer of a licensee must not give conflicted remuneration to a credit representative, if it would be a contravention of subsection 158NC(1) of the Credit Act for the credit representative to accept the conflicted remuneration.

Subsections 158NE(1) and (2) of the Credit Act provide that a credit provider must not give a representative of a licensee conflicted remuneration in circumstances prescribed by the Regulations, if the licensee or the representative is a mortgage broker or a mortgage intermediary.

Subregulation 28VL(2) provides that a credit provider must not give conflicted remuneration to the licensee or a representative of the licensee (other than a credit representative), if it would be a contravention of subsection 158NB(1) of the Credit Act for the licensee or representative to accept the conflicted remuneration.

Subregulation 28VL(3) provides that an employer of a licensee must not give conflicted remuneration to a credit representative, if it would be a contravention of subsection 158NC(1) of the Credit Act for the credit representative to accept the conflicted remuneration.

Subsections 158NF(1) and (2) of the Credit Act provide that a mortgage intermediary must not give the licensee or representative conflicted remuneration in circumstances prescribed by the Regulations, if the licensee or the representative is a mortgage broker or mortgage intermediary.

Subregulation 28VM(2) provides that a mortgage intermediary must not give conflicted remuneration to the licensee or a representative of the licensee (other than a credit representative), if it would be a contravention of section 158NB of the Credit Act for the licensee or representative to accept the conflicted remuneration.

Subregulation 28VM(3) provides that a mortgage intermediary must not give conflicted remuneration to a credit representative, if it would be a contravention of subsection 158NC(1) of the Credit Act for the credit representative to accept the conflicted remuneration.

Schedule 2 – Consequential amendments

Schedule 2 to the Regulations makes a number of consequential amendments.

Items 1-43

These include amendments to ensure that all provisions of the Credit Regulations that currently apply in relation to ‘commissions’ also apply in relation to ‘conflicted remuneration’. The affected provisions generally relate to information that must be disclosed to consumers in particular circumstances. (Schedule 2, items 1-43, paragraphs 9AB(6)(b), 20(5)(b), (c) and (d), 20(12)(c), subparagraphs 25(2)(b)(i) and (ii), 25(2A)(b)(i) and (ii), 25(4)(d)(i) and (ii), 25(5)(e)(i) and (ii), paragraph 25H(1)(e), regulation 26 (paragraph (b) of the definition of *product designer*), regulation 26 (definitions of *trail commission* and *volume bonus arrangement*), subregulation 26A(2), paragraphs 26A(2)(a) and (b), 26A(3)(b), (c) and (d), regulation 27 (heading), subparagraph 27(2)(a)(ii), subregulation 27(3), subregulation 27A(2) (heading), subregulation 27A(2), paragraphs 27A(2)(a) and (b) and (4)(b), (c) and (d), regulation 27B (heading), subparagraph 27B(2)(a)(ii), regulation 28G (heading), subregulation 28G(2), paragraph 28G(2)(a), (2)(b), (c) and (d), subregulation 28G(2) (note), subregulations 28G(5) and (6), paragraphs 28G(6)(a), (b) and (c), subregulation 28G(6), paragraphs 28G(7)(a) and (b), subregulation 28G(8), regulation 28H (heading), subregulations 28H(2), (3) and (4), paragraph 28R(3)(a),(b) and (c), subregulation 28R(4))

Items 44-47

These consequential amendments also include amendments to replace references to ‘loan account offset arrangements’ in regulation 109 with references to the new definition of ‘offset accounts’ which is contained in subregulation 28VBA(3) in item 4 of Schedule 1 to the Regulations. (Schedule 2, items 44-47, regulation 109 (heading), subregulations 109(1) and (2) and paragraph 109(2)(b))

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers) (Mortgage Brokers) Regulations 2020

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers) (Mortgage Brokers) Regulations 2020* (the Regulations), together with Schedule 3 to the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Act 2020* (the Act) implement the Government's response to Recommendation 1.3 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Financial Services Royal Commission), to address conflicted remuneration for mortgage brokers.

The Regulations amend the *National Consumer Credit Protection Regulations 2010* (the Credit Regulations) to prescribe circumstances under which a benefit is and is not conflicted remuneration. They also prescribe circumstances under which conflicted remuneration must not be accepted and circumstances in which conflicted remuneration must not be given.

The Regulations amend the Credit Regulations to set out five kinds of benefit that are not conflicted remuneration:

- certain monetary and non-monetary benefits given by the consumer;
- monetary benefits that meet a number of specific requirements directed at ensuring the benefits are transparent and do not negatively impact consumers;
- infrequent, low-value non-monetary benefits;
- non-monetary benefits related to education and training; and
- non-monetary benefits related to IT support.

In relation to the second kind of benefit, the requirements include that the benefits are not volume-based benefits or campaign-based benefits. In relation to certain residential property loans, if a benefit linked to the amount borrowed, the value of any commissions paid within the first year of the loan must be linked to the amount drawn down by the borrower, calculated in accordance with the Regulations.

Clawback arrangements in relation to monetary benefits must also meet certain requirements.

The Regulations also amend the Credit Regulations to prescribe circumstances in which conflicted remuneration must not be accepted and must not be given. In particular, the amendments enliven the obligations introduced by the Act not to accept and not to give conflicted remuneration.

The Regulations also make amendments to the Credit Regulations that are consequential to changes made by the Act.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.